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No. 86-473

In The
Supreme Court of the United States
October Term, 1987

SIERRA CLUB,
Petitioner,
v.
SHELL OIL COMPANY,
Respondent.

SIERRA CLUB,
Petitioner,
v.
MONOCHEM, INC.,
Respondent.

SIERRA CLUB,
Petitioner,
v.
COPOLYMER RUBBER AND CHEMICAL CORP. *et al.*,
Respondent.

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INTRODUCTION

This case raises the identical issue to that in *Gwaltney v. Chesapeake Bay Foundation and Natural Resources Defense Council, Inc.*, No. 86-473, scheduled for oral argument on October 5, 1987. Sierra Club urges this Court to grant the writ to allow the decision below to be modified in light of the decision in *Gwaltney*.

The decision below requires reversal no matter what the outcome in *Gwaltney*. The court below effected a radical shift in the law. It read the strict liability provision out of the Clean Water Act, and instead apparently required a citizen plaintiff in a civil action to prove the elements the government must prove in a criminal prosecution. The opinion below reversed the burden in a citizen enforcement case, contrary to the statute and the settled law in all other courts.

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ARGUMENT

I. The Fifth Circuit Is The Only Court That Has Read The Strict Liability Standard Out Of The Clean Water Act.

The fundamental error of the Fifth Circuit in the cases below was to remove from the Act strict liability for violating an NPDES permit. Until the court decided the case below, it was a simple matter to determine whether a polluter was liable. If he had violated his permit, he had violated the Act. *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 (1976). The defendants' own discharge monitoring reports were used to establish liability. *U.S. v. Ward*, 448 U.S. 242, 251-55 (1980).

All the District and Circuit Courts except those in the Fifth Circuit, have found that liability is judged on a strict liability basis. The reason is simple. The Act's permit requirements "were written without regard to intentionality . . . making the person responsible for the dis-

charge of any pollutant strictly liable." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979).[1]

The reason Congress wrote the Act with a strict liability standard is straightforward: to make permit enforcement simple, certain and swift. As the D.C. Circuit put it, permits could not be enforced if enforcement "depend[ed] on murky determinations concerning the sequence of events in the plant, whether those events would have been avoidable if other equipment had been installed . . ." and so on. *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1058 (D.C. Cir. 1978).

What strict liability means is that a defendant's efforts, whatever they might have been, and the problems in its plant, whatever they were, are irrelevant to a judgment of liability. The only relevant question is whether the defendant has exceeded its permit; if it has, it is liable. Questions of good faith, reasonable efforts, and so on, are relevant to determining only the size of the penalty. See Water Quality Act of 1986, Pub. L. No. 100-4, § 313(c) (1987), codified at 33 U.S.C. § 1319(d). They do not arise when determining liability.

The Fifth Circuit would remove strict liability from the Act. Under the guise of determining whether the defendant is "in violation" at the time of suit, the Fifth Circuit requires that a demonstration be made that violations are the "product of [defendant's] systematic neglect of discharge limitations or of inadequate pollution control facilities." 817 F.2d 1169 at 1173, 74. This is precisely the "murky determination" that the D.C. Circuit, in *Weyerhaeuser*, said would make permit enforcement unworkable. It would.

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1. See also *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1374-77 (D.C. Cir. 1977); *State of New York v. Shore Realty Corporation*, 759 F.2d 1032, 1042 (2d Cir. 1985); *Chesapeake Bay Foundation and Natural Resources Defense Council v. Bethlehem Steel Corporation*, 608 F. Supp. 440, 451-53 (D.Md. 1985); *Connecticut Fund for the Environment and Natural Resources Defense Council v. The Job Plating Company*, 623 F. Supp. 207, 218 (D.Conn. 1986).

This error is perhaps most clearly illustrated in the following way. There is a narrow exception to strict liability for permit violations known as the "upset" defense. Codified at 40 C.F.R. 122.41(n)(1), the burden is explicitly placed on a defendant to show, as part of the defense, that its violations were not caused by "operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operators". Yet these are just the kinds of things—"systematic neglect"—that the court would make a plaintiff show before liability could attach. The court below has reversed the statutory burdens.

The court below strikes the strict liability standard from the Act for citizen suits, and requires some vaguely defined demonstration of willfulness or negligence. Willful or negligent conduct, however, is separately punishable under the Act with criminal penalties. 33 U.S.C. § 1319(c)(1). See also *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). Citizens, of course, may not bring criminal actions under the Act. Yet the showing that the court below requires a citizen plaintiff to make in a civil suit sounds like that required for a criminal prosecution.

A model of how to read the Act's enforcement scheme, which directly conflicts with the decision below, is provided by a recent Ninth Circuit case. In *Sierra Club v. Union Oil Company of California*, 813 F.2d 1480 (9th Cir. 1987), the district court had engaged in a trial, much along the lines required by the court below. It had excused all the defendant's violations. The Ninth Circuit reversed on all grounds, and held Union Oil liable for all alleged violations, by comparing its discharge monitoring reports to its permits.

What the Ninth Circuit said of one excuse—sampling error—applies to all the excuses allowed by the court below:

> Were we to accept Union Oil's argument regarding the use of sampling errors to excuse reported permit exceedances, we would be sanctioning countless additional hours of NPDES litigation and creating

> new, complicated factual questions for district courts to resolve. As indicated by the legislative history, Congress hoped to limit such situations. In addition, if each self-monitoring report is to be considered only prima facie rather than conclusive evidence of an exceedance of a permit limitation, citizen groups like the Sierra Club would be taking a considerable risk whenever they initiated a citizen enforcement action pursuant to 33 U.S.C. § 1365. While a permittee's publicly filed reports might clearly indicate that illegal pollution was taking place, the permittee might have additional information unavailable to citizen groups indicating that sampling error rendered the reports meaningless. Finally and most importantly, allowing permittees to excuse their reported exceedances by showing sampling error would create the perverse result of rewarding permittees for sloppy laboratory practices. Such an approach would surely undermine the efficacy of the self-monitoring program.

813 F.2d at 1492. The Ninth Circuit has read the Act correctly; the Fifth Circuit has rewritten it.

II. The District Court's Power To Impose Penalties In Permit Enforcement Cases Is The Same Whether The Case Is Brought By The Attorney General Or By A Private Attorney General.

The court below moved from the observation that citizens do not have the full enforcement powers of the government to the conclusion that in citizen suits—and only in citizen suits—the court must hold a trial to judge whether the defendant is "in violation" at the time of suit. This is a non sequitur.

Sierra Club has never argued that the citizen suit contains the full armamenterium of enforcement powers available to the federal government. Citizens cannot bring criminal actions or issue administrative orders. They must give 60 days notice of intent to sue and demonstrate standing. The government may preclude a citizen suit by filing an action in court during the 60-day notice period.[2]

2. In such a case the citizen may intervene as of right. 33 U.S.C. § 1365(b)(1)(B).

So much is obvious. But these restrictions say nothing about the powers of the district court in a properly commenced citizen enforcement action.

Once a citizen has given notice, filed an action, and shown standing, the district court has precisely the same power to impose penalties in a permit enforcement case brought by the government or by a citizen. This could not be more straightforward in the statute. Section 309(d) of the Act, 33 U.S.C. § 1319(d), authorizes the court to impose penalties in a government action against one who "violates" the Act. The citizen suit provision, empowers the court to impose "*any* appropriate civil penalties under [Section 309(d) of the Act] Section 1319(d)." Section 505(a) of the Act, 33 U.S.C. § 1365(a) (emphasis added). The statute could not be clearer. *The remedies in permit enforcement cases, whether brought by the attorney general or private attorney are the same.*[3]

III. The Cases Below Should Be Reversed Even If Gwaltney Is Reversed.

Even if this Court decides that the Fourth Circuit is in error in *Gwaltney v. Chesapeake Bay Foundation and Natural Resources Defense Council*, No. 86-473, the decision below should be reversed. Although it is not obvious in reading respondents' opposition to the petition for certiorari, or in reading the opinion below, every one of the respondents violated its permit *both before and after* the re-

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3. In its amicus brief in *Gwaltney*, the United States has argued that the district court has the power to impose penalties in citizen suits only if there is an allegation of an ongoing violation. Because the United States has facilities throughout the country subject to NPDES permits, it is a potential defendant. See 33 U.S.C. § 1323. It is understandably not enthusiastic about the power the district court has in citizen actions. One such action illustrates the problem. California, as a citizen, sued the Navy for violating a permit involving discharges into San Francisco Bay. The Navy maintains that it ceased discharges just prior to suit, and that California knew the violations would not continue. The United States thus claims that the district court lacks jurisdiction over its actions. The district court dismissed the action, California appealed, and the Ninth Circuit is awaiting the outcome of *Gwaltney*. *California v. United States Department of the Navy*, No. 86-1972 (9th Cir.).

spective complaints were filed; several violated during the month the complaint was filed. Even if this Court reverses *Gwaltney*, and holds that some "continuing" violation is required for liability to attach, companies that violate their permits before and after the complaints are filed must be held liable for those violations, without a trial to determine whether the violations after the filing were produced by the same "cause" as the violations before filing.

Sierra Club believes that a polluter may be held liable for penalties under the Act until the statute of limitations expires. When one has committed a proscribed act, whether breach of contract, commission of a tort, or falsification of a tax return, one is potentially liable and remains potentially liable until either the delict is cured by penalties, damages, a prison term or some other remedy, or the statute of limitations has expired. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944).

The same is true of the civil penalty remedy under the Clean Water Act. One holds a permit, which makes it a requirement of federal law to discharge no more than a certain amount of specific pollutants. If one exceeds those amounts, one is potentially liable for the imposition of a civil penalty payable to the United States Treasury in a suit brought by the government or by a private attorney general until the statute of limitations has run out.[4]

The errors in the opinion below trace their origin to an earlier Fifth Circuit decision, *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985). In an attempt to bar the plaintiffs' state law damage claims, the panel in *Hamker* applied the notion appropriate for

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4. District courts in the Second and Fourth Circuit have agreed with Sierra Club's argument that the applicable statute of limitations is prescribed at 28 U.S.C. §2462, and is five years. *See, e.g., Connecticut Fund for the Environment and NRDC v. Job Plating Company*, 623 F. Supp. 207, 211-13 (D.Conn. 1985) and *Chesapeake Bay Foundation and NRDC v. Bethlehem Steel Corporation*, 608 F. Supp. 440, 446-50 (D.Md. 1985).

injunctive remedies—continuity in violation—instead of the standard appropriate to penalties and all other non-injunctive relief in American law—whether the statute of limitations has expired. The court below broadened *Hamker's* mistaken "continuing violation" requirement to effect a radical change in the statute.

IV. The Citizen Suit Provision Is Not Unconstitutional.

1. Cases On The Separation Of Powers.

Two recent cases of this Court explore the separation of powers doctrine: *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Bowsher v. Synar*, 106 S.Ct. 3181 (1986).

Both *Buckley v. Valeo* and *Bowsher v. Synar* involve variations on the problems of whether the Congress can by statute give executive powers to persons that it and not the President appoints to office. In *Buckley v. Valeo*, the separation of powers problem centered on a provision of the Federal Elections Campaign Act. The statute created a Federal Elections Commission with broad powers of adjudication, rulemaking and enforcement. The Commission was made up of eight persons, of which only two were appointed by the President. This Court found that this structure was unconstitutional. The essential reason was that executive functions created by the statute were to be carried out by persons who were the designees of Congress.

With respect to the institution of civil litigation to enforce the statute, the sole prosecutorial discretion was vested in the Commission. Congress in effect was both writing and enforcing the law. *Buckley v. Valeo* decided that Congress may not pass a statute that creates public law, and vests enforcement of that public law exclusively in the hands of its own appointed officials.

Bowsher v. Synar, 106 S.Ct. 3181 (1986), addresses whether Congress can delegate to the Comptroller General, an official appointed by and dismissable by Congress, the power to designate mandatory cuts in the federal budget. For reasons analogous to those in *Buckley v. Valeo*, this Court held that the delegation to the Comptroller General

was unconstitutional because it allowed the Congress to retain control over a decision that was inherently executive. 106 S.Ct. at 3192.

Read together, *Buckley v. Valeo* and *Bowsher v. Synar* stand for the proposition that under the Constitution Congress has the power to pass laws. It has neither the power to enforce them in court, nor execute them, through officers whom it appoints.

2. The Separation Of Powers Cases Are Irrelevant In This Case.

Buckley v. Valeo and *Bowsher v. Synar* are without application to the citizen suit provision of the Clean Water Act. There are two reasons. First, citizens are not agents appointed and dismissable by Congress, but entirely independent actors. Second, and more fundamentally, citizens under the citizen suit provision do not sue to enforce what *Buckley v. Valeo* calls "public law." They sue instead to vindicate statutory rights that they have as individuals.

a. The People Are Not An Agent Of Congress.

Both *Buckley v. Valeo* and *Bowsher v. Synar* stress the degree of control that Congress retained over the persons to whom it had delegated duties to carry out or enforce the law. The question in each case was whether it had retained too much control over execution or enforcement of the law; the answer in each was yes, because the persons executing or enforcing the law were dependent for their offices upon Congress. Nothing could be further from these facts than the present case. It would be absurd to say that citizens are answerable to Congress in such a way that Congress has arrogated to itself the civil enforcement power under the Clean Water Act.

On the contrary, the executive can issue administrative enforcement orders, can bring criminal actions, can bring civil actions, can preclude citizen suits by filing first, and can intervene in any civil action brought by a citizen. 33 U.S.C. §§ 1319; 1365. Unlike the situation in *Buckley*

v. Valeo, Congress had hardly arrogated to itself all of the civil enforcement powers that appropriately reside in the Attorney General. The Executive, not Congress, has them.

Moreover, the citizenry is not an agent of Congress as was the Federal Election Commission in *Buckley v. Valeo* or the Comptroller General in *Bowsher v. Synar.* To suggest that citizens are the agents of Congress is to get everything backwards.

b. The Citizen Suit Provision Gives Persons The Right To Sue For Injuries To Their Own Interests.

Perhaps the deeper reason that the respondents' argument is wrong is that it takes no account of what the citizen suit provision gives a citizen the right to do.

The citizen suit provision gives the right to bring a civil action to a citizen whose interests are or may be adversely affected by a defendant's pollution in violation of the law. 33 U.S.C. § 1365(a), (g). This statutory requirement of an individualized interest is connected with the standing requirements of the citizen suit provision. To have standing, a person must, for purposes of Article III, have a cognizable interest, whether aesthetic, environmental, recreational, or some other, in the resource for the protection of which he institutes suit. *Sierra Club v. Morton,* 405 U.S. 727 (1972); *Sierra Club v. SCM Corporation,* 747 F.2d 99, 105-107 (2nd Cir. 1984).

In other words, the citizen suit provision gives individual persons the right to sue "*on his own behalf,*" Section 505(a) of the Act, 33 U.S.C. § 1365(a) (emphasis added), those who pollute waters with which the person bringing the suit has some real connection. Plaintiffs in a permit enforcement suit are the beneficiaries of a legislative grant of standing. Congress intended both general and specific deterrence to result from permit enforcement, and citizen plaintiffs benefit, with the other members of the public, from a successful prosecution. *SPIRG v. AT&T Bell Laboratories,* 617 F. Supp. 1190, 1200 (D.N.J. 1985);

SPIRG v. P.D. Oil and Chemical, 627 F. Supp. 1074, 1083 (D.N.J. 1986). Put differently, citizens may not sue on some theory of public law: if I live in Maryland, I may not sue a polluter in Texas merely because he is violating the law. Some showing of a personal interest adversely affected would be required. *Sierra Club v. SCM Corporation*, 747 F.2d 99, 105-107 (2nd Cir. 1984).

That persons are suing in their own behalf is a complete answer to the respondents' argument. Congress can create a statutory right, the violation of which gives rise to standing to sue for the vindication of the right. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). It has given such a right and the opportunity for redress in the Clean Water Act.

CONCLUSION

Because the opinion below requires reversal no matter what the outcome in *Gwaltney*, this Court should grant the writ requested.

Respectfully submitted,

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